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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-838

STATE OF MAINE AND MICHAEL R. PETIT, COMMISSIONER OF THE DEPARTMENT OF HUMAN SERVICES, STATE OF MAINE,

Petitioners,

v.

JOLINE THIBOUTOT AND LIONEL THIBOUTOT, AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

BRIEF FOR PETITIONERS

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March 1980

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Respondents.

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court is reported at 405 A.2d 230 (Me. 1979). (A.49-65.)

The opinion of the Maine Superior Court for Sagadahoc County is unreported. (A. 43-44.)

JURISDICTION

The Judgment of the Supreme Judicial Court (A. 47) was entered on August 31, 1979. The petition for a writ of certiorari was filed on November 29, 1979, and was granted on January 21, 1980, at which time

this Court also granted respondents' motion for leave to proceed *in forma pauperis*. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether petitioners' good faith violation of the Federal Social Security Act and its regulations, with resulting incorrect reductions of AFDC benefits to respondents, but without a violation of respondents' constitutional rights, constitutes a violation of 42 U.S.C. § 1983.

2. Whether the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, allows consideration of an award of attorney's fees to respondents who prevail solely on a Social Security claim in an action where no violation of constitutional rights was found.

3. Whether 42 U.S.C. § 1983 affords respondents a remedy in a state court for a violation of the Social Security Act.

STATUTES INVOLVED

United States Code, Title 42:

§ 602. *State plans for aid and services to needy families with children; contents; approval by Secretary*

(a) A State plan for aid and services to needy families with children must . . . (7) except as may otherwise be provided in clause (8), provide that the State agency shall, in determining need, take into consideration any

other income and resources of any child or relative claiming aid to families with dependent children, or any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earnings of such income;

§ 1983. *Civil action for deprivation of rights*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

§ 1988. *Proceedings in vindication of civil rights*

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and

changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

As amended Pub. L. 94-559, § 2, *Oct.* 19, 1976, 90 *Stat.* 2641.

STATEMENT

The plaintiffs, Lionel and Joline Thiboutot, are married with eight children: four are common to the marriage, one is Joline Thiboutot's by a prior marriage and three are Lionel Thiboutot's by a prior marriage. Before November, 1975, Lionel Thiboutot received Aid to Families with Dependent Children[1] benefits based upon a regulation promulgated by the State of Maine

[1] Hereinafter referred to as AFDC.

which the United States Department of Health, Education and Welfare found out of compliance with Federal regulations. In November of 1975, the Maine Department of Human Services[2], acting on its belief that a reduction in Lionel Thiboutot's AFDC benefits was required by a change in Federal regulations, notified Lionel Thiboutot of same. The change was essentially as follows: In computing the available income of Mr. Thiboutot to determine the amount of AFDC benefits allowed for his three children by his former marriage, the Department would no longer subtract that portion of Lionel's income which went to the support of the four children of both Lionel and Joline (those children not being eligible for AFDC benefits), although Mr. Thiboutot was required by law to support those children and did in fact support them. (A. 23-25.)

The Thiboutots pursued their administrative remedies in an effort to get the Department to revise its ruling. A final adverse decision was rendered by the Commissioner of the Department on March 18, 1976. From that decision the Thiboutots filed a timely appeal to the Maine Superior Court under Maine Rules of Civil Procedure, Rule 80B[3], alleging that the Commissioner's decision was in violation of state and federal statutes. Both the State of Maine and David Smith, as Commissioner of the Maine Department of Human Services, were named as defendants, the latter having been succeeded by petitioner Michael R. Petit, the present Commissioner. (A. 7-9.)

[2] Hereinafter sometimes referred to as the Department.

[3] Hereinafter sometimes referred to as Rule 80B. Rule 80B is set forth in part, *infra* at 17, n.16.

On January 7, 1977, an amended complaint was filed seeking class relief as well as relief for the Thiboutots. The amended complaint, brought pursuant to 42 U.S.C. § 1983 as well as Rule 80B, alleged violation of the Social Security Act, 42 U.S.C. § 602(a) (7), and pertinent federal and state regulations. (A. 11-15.)

A motion for a separate trial on the issue of liability was granted on June 17, 1977. (A. 27.) On July 15, 1977, the Maine Superior Court entered judgment for the Thiboutots on the merits. Petitioners were enjoined from enforcing the challenged regulation, and ordered to adopt new regulations, notify all class members of the new regulations, and pay benefits prospectively to eligible class members. The Superior Court reserved decision on retroactivity of relief and on the right to an award of attorney's fees. (A. 31-32.)

Petitioners complied with the order. (A. 39.) On February 27, 1978, final judgment was entered ordering retroactive benefits for the Thiboutots but denying plaintiffs' motion for retroactive benefits for the class and for attorney's fees. (A. 43-44.) Plaintiffs appealed from this judgment while petitioners did not cross-appeal. (A. 45.)

The appeal was argued before the Supreme Judicial Court in September, 1978, and final judgment was rendered on August 31, 1979. (A. 49.) Maine's highest court remanded the case to the Superior Court for a determination as to whether attorney's fees should be awarded to plaintiffs' counsel. Further hearings on that issue have been stayed in the Superior Court pending the decision of this Court.

However, the Supreme Judicial Court concluded, *inter alia*, that a right exists to sue under 42 U.S.C. § 1983 in state court (*Opinion, paragraph* 8; *A.* 56); that a similar right exists to enforce the provisions of

the Social Security Act even though the claim is not of constitutional dimension (*Id.*); and that an award of attorney's fees for a violation of the Social Security Act may be appropriate pursuant to 42 U.S.C. § 1988 even though no constitutional rights have been violated (*Opinion, paragraphs* 11, 12; *A.* 61).

The petitioner-State of Maine thereupon filed its petition for certiorari which was granted by this Court on January 21, 1980.

SUMMARY OF ARGUMENT

I. As set forth in the factual Statement and Questions, *supra*, the issues in this case concern the applicability of 42 U.S.C. § 1983 in an action involving, *at most*, a good faith dispute over the computation of welfare benefits arising out of differing interpretations of the Social Security Act and related regulations. The Court below, broadly applying the language of section 1983, held that the state's technical administrative error in interpreting the Social Security Act constituted a "deprivation of . . . rights . . . secured by the . . . laws . . . .," thereby enabling consideration of an award of fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976. This decision was erroneous, as scrutiny of the above three relevant Acts clearly shows.

The historical background of 42 U.S.C. § 1983 portrays the United States, at the time of the enactment of that section's predecessors, as a country racked with racial violence, racial discrimination, and deprivations of fundamental human rights. *Monroe v. Pape*, 365 U.S. 167, 172-174 (1961), *rev'd, Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). Primarily to provide for enforcement of the

Fourteenth Amendment[4], and to counteract these rampant violations of basic liberties, Congress enacted several Civil Rights Acts[5]. However, the case at bar has little in common with those Acts as demonstrated by respondent Thiboutots' pleadings and the lower court's opinion.

On April 14, 1976, respondents filed their complaint alleging "violation of applicable state and federal law," but only as it related to the Social Security Act, 42 U.S.C. § 602(a)(7). (*Complaint, paragraphs* 1 *and* 8; A. 7-8.) On October 19, 1976, the Civil Rights Attorney's Fees Awards Act of 1976, Public Law 94-559, amending 42 U.S.C. § 1988 and codified therein, was enacted. *Supra* at 3-4. Shortly thereafter, respondents amended their complaint by adding the words "and 42 U.S.C. § 1983." (*Amended Complaint, paragraph* 1, A. 11.) It is this seemingly innocuous inclusion in the complaint that has, in petitioners' view, led to the current debate regarding the applicability of § 1983 to the Social Security Act and respondents' claim to attorney's fees pursuant to § 1988. Petitioners assert that, given the genesis of § 1983, a violation of civil rights, as those rights are commonly understood, must occur in order for that section to be violated. Certainly, a good faith[6] attempt to comply with duly pro-

[4] *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 611 (1979).

[5] See Civil Rights Act of 1866, 14 Stat. 27; §1 of the Civil Rights Act of 1871, 17 Stat. 13; Revised Stat. 1979 (1874). "Section 1983 first appeared in its present form as § 1979 of the Revised Statutes[3], which in turn was derived from § 1 of the Civil Rights Act of 1871, 17 Stat. 13." *Id.* at 624 ([3]Revised Stat. § 1979 is identical to 42 U.S.C. § 1983; *Id.* at n.3.)

[6] There was no malice, ill-will, bad faith or similar allegation pleaded by respondents or found by the lower court.

mulgated rules[7] believed to be in conformity with federal regulations[8] and applicable law (Social Security Act § 602(a)(7)) cannot result in the deprivation, under § 1983, of respondents' civil rights, without more. This is especially true when, as the court below has concluded, *rights of constitutional dimensions are not involved.* (*Emphasis added*) (*Opinion, Supreme Judicial Court, paragraph* 8; *A.* 56.)

II. Even if this Court determined that the provisions of 42 U.S.C. § 1983 encompass violations of the Social Security Act, it does not necessarily follow that an award of attorney's fees should properly be considered pursuant to the Civil Rights Attorney's Fees Awards Act of 1976. In fact, at least two factors militate against such a grant. First, an award of counsel fees for a violation of the Social Security Act is unwarranted absent specific Congressional authorization. *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975). Although Congress has, since 1870, amended more than fifty statutes[9] to provide for the awarding of attorney's fees, it has declined to so amend that portion of the Social Security Act regarding the AFDC program. By this inaction, Congress has demonstrated that it is satisfied with the present remedies contained within the statutory scheme of the Social Security Act.

Second, the legislative history reveals that the Fees Act was intended to apply to parties who prevailed in

[7] Maine Public Assistance Payments Manual (MPAPM) Ch. II, App. C, at 1, 2 (A. 17-19).

[8] 45 C.F.R. § 233.20(a)(3)(ii)(D).

[9] S. Rep. No. 94-1011, 94th Cong., 2d Sess., *reprinted in* [1976] *U.S. Code Cong. and Ad. News* 5910, *at* 3.

an action to enforce civil rights. Clearly, no such rights are at issue in the case at bar. Consequently, the Maine Court erred in applying the Fees Act where no clear legislative authorization or intent was present.

III. Petitioners alternatively assert that state courts are without jurisdiction to consider alleged § 1983 causes of action, and therefore are precluded from considering an award of attorney's fees pursuant to the Fees Act. The legislative history of 42 U.S.C. § 1983 reveals that Congress intended to create a cause of action for the violation of civil rights cognizable exclusively in Federal courts. Since no specific or implied jurisdictional grant to state courts exists, jurisdiction therein cannot lawfully be found.

ARGUMENT

I.

A GOOD FAITH ERROR IN INTERPRETING THE SOCIAL SECURITY ACT DOES NOT RESULT IN A DEPRIVATION OF RIGHTS AS CONTEMPLATED BY 42 U.S.C. § 1983.

A. *The History of* 42 *U.S.C.* § 1983, *In Conjunction with the Pleadings and Opinion in the Present Case, Does Not Allow for a Finding of a Section* 1983 *Violation.*

Petitioners argue that section 1983 does not encompass a deprivation of rights arising solely out of the Social Security Act § 602(a)(7) (AFDC program). Although the legislative history of both section 1983 and its predecessors was thoroughly discussed in *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600 (1979), petitioners submit that the inter-

pretation of the statutory phrase "and laws"[10] as provided by several Justices therein is open to question. A correct interpretation of these words is of vital importance, for in order to assert a claim for an award of attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976[11], respondents must have prevailed on a claim recognized as a section 1983 action or proceeding. Since there are no constitutional rights involved in this matter (*Chapman, supra* at 615) (*Paragraph* 8, A.56), respondents must rely upon the Maine Supreme Judicial Court's erroneous conclusion that the "and laws" provision of section 1983 affords them a remedy for a deprivation of rights under the Social Security Act. *Id.*

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[10] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution *and laws*, shall be liable to the party injured in any action at law, suit in equity, or other proper proceedings for redress. (*Emphasis added*)

The words "and laws" were added in the revision of 1874, Revised Stat. § 1979. *Chapman* at 608.

[11] 42 U.S.C. § 1988 provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

In order to understand properly the scope of section 1983 and its predecessor, section 1979[12], a look at the social environment that existed at the time of the enactment of section 1979 is necessary. Such an overview is provided by *Monroe v. Pape*, 365 U.S. 167 (1961), *rev'd, Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978).

> Section 1979 came onto the books as § 1 of the Ku Klux Klan Act of April 20, 1871. It was one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment. The Title of the legislation was: "AN ACT to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes."

365 U.S. at 171. President Ulysses S. Grant sent a message to Congress supporting the enactment of the "Ku Klux Klan Act" on March 23, 1871. The message read, in part:

> A condition of affairs now exists in some states of the Union rendering life and property insecure and the conveying of the mails and the collection of the revenue dangerous . . . Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectively secure life, liberty, and property, and the enforcement of law in all parts of the United States . . . *Id.* at 172, 173.

"This Act of April 20, 1871 . . . was passed by a Congress that had the Klan particularly in mind." *Id.* at

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[12] See n. 5 at 8, *supra*.

174. Indeed, an Ohio representative, Mr. Beatty, stated in the United States House of Representatives his view of the Act as cited by the Court at 175:

> . . . certain States have denied to persons within their jurisdiction the equal protection of the laws. The proof on this point is voluminous and unquestionable. [M]en were murdered, houses were burned, women were outraged, men were scourged . . .

A further examination of the history of section 1983 reveals that its primary purpose was to enforce the provisions of the Fourteenth Amendment[13]. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 545 (1971); *Mitchum v. Foster*, 407 U.S. 225, 242 (1971); *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 611 (1979). Furthermore, the *Monroe* Court identified three specific problem areas existing at the time of the enactment of § 1979, which demanded the creation of a judicial remedy to safeguard Fourteenth Amendment rights. First, certain kinds of state laws which were contrary to the rights of Negroes were to be overridden. Second, a remedy was provided to be utilized where a state law existed in theory but was unavailable in practice. Third, a federal remedy was provided to be utilized where a state remedy existed in theory but was unavailable in practice. 365 U.S. at

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[13] The Court in *Chapman* stated:

"**. . . [I]t is also clear that the prime focus of Congress in all of the relevant legislation was ensuring a right of action to enforce the protections of the Fourteenth Amendment and the federal laws enacted pursuant thereto." 441 U.S. at 611. Of course, the Social Security Act was not enacted to enforce the protection of the Fourteenth Amendment, nor was it enacted pursuant thereto.**

174. An additional contemporaneous problem area noted at a later time by the Court was the need for a remedy when a public official abused his position. *Imbler v. Pachtman*, 424 U.S. 409, 433 (1976) (White, J., *concurring*); *cf. United States v. Classic*, 313 U.S. 299, 326 (1941) (wherein it was stated that a cause of action provided by section 1983 is basically one for "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law").

Neither the primary purpose underlying the enactment of section 1983, the protection of Fourteenth Amendment rights, nor the particular areas recognized as requiring remedial action by the Congress are at issue in the case at bar. Nowhere in the complaint (A. 7) or the amended complaint (A. 11) is there any allegation of a denial of any Fourteenth Amendment right. Nowhere in the Order of the Superior Court (A. 31-32), nor in the Final Judgment of the Superior Court (A. 43-44), is there contained any finding of a denial of Fourteenth Amendment rights, or, for that matter, any other constitutional rights. On appeal, the Maine Supreme Judicial Court concluded that the rights to receive welfare benefits under the Social Security Act "were not of constitutional dimension." (*Paragraph* 8, A. 56). Here, as in *McCall v. Shapiro*, 416 F.2d 246, 250 (2d Cir. 1969), ". . . [T]here appears no claim of racial or other impermissible classification or discrimination or other classic civil rights issue, but rather a question of statutory interpretation by the Commissioner in a single case." Certainly, 42 U.S.C. § 1983 was never intended to be applied to a violation of the Social Security Act, and to allow such an application was clearly erroneous.

B. *The Applicable Provisions of the Social Security Act Do Not Provide for Equal or Civil Rights as Contemplated by Section* 1983.

Section 1983, standing alone, does not provide protection for civil rights since it contains no provisions for any substantive rights. *Chapman, supra* at 618. Moreover, "an allegation of incompatibility between federal and state statutes and regulations does not, in itself, give rise to a claim 'secured by the Constitution' " [within the meaning of § 1343(3)], *Chapman*, 441 U.S. at 615. Petitioners, therefore, not unlike the Court of Appeals in *Gonzales v. Young*[14], fail to perceive how the respondents' "civil rights" were violated. Indeed, the Social Security Act does not deal with the concept of "equality" or with the guarantees of "civil rights" as those terms are commonly understood. *Chapman, supra* at 621. In fact, while discussing jurisdictional questions, the Court in *Chapman* shed some light on the applicability of § 1983 to civil rights actions.

> We reach a similar conclusion with respect to the argument that § 1983 is a statute 'providing for the protection of civil rights, including the right to vote'. Standing alone, § 1983 clearly provides no protection for civil rights since, as we have just concluded, § 1983 does not provide any substantive rights at all. To be sure, it may be argued that § 1983, does in some sense 'provide[s] for the protection of civil rights' when it authorizes a cause of action based on the deprivation of civil rights

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[14] 560 F.2d 160, 167 (3d Cir. 1977), *aff'd sub nom. Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979): "No claim was made by Gonzales of infringement of personal liberty, unlawful classification, or discrimination."

> guaranteed by other Acts of Congress. But in such cases, there is no question as to jurisdiction, and no need to invoke § 1983 to meet the 'civil rights' requirements of § 1343(4); the Act of Congress which is the actual substantive basis of the suit clearly suffices to meet the requisite test. It is only when the underlying statute is not a civil rights act that § 1983 need be invoked by those in claimant's position to support jurisdiction. And in such cases, by hypothesis, § 1983 *does not provid*[*e*] *for the protection of civil rights.*'" (Footnote omitted.) 441 U.S. at 618. (*Emphasis added.*)

Since section 1983 does not substantively assist the respondents in this matter, it becomes apparent that it was pleaded solely to enable respondents to assert a claim for attorney's fees pursuant to the Attorney's Fees Awards Act of 1976, and not to assist respondents in obtaining relief as section 1983 was originally designed to do. Although the Supreme Judicial Court rejected petitioners' argument that since the lower court did not make a finding or mention of any section 1983 violation, there could not be an award of attorney's fees pursuant to the Attorney's Fees Awards Act (*paragraph* 7, A.56), it is difficult to ascertain how the trial court could have found otherwise. There were no allegations of Fourteenth Amendment denials in any of respondents' pleadings, nor were there any assertions of violations of civil rights. The lower court could not find in theory what did not exist in reality.

When respondents amended their complaint to include a reference to section 1983, (*Amended Complaint, paragraph* 1, A. 11), the change in language

was not necessary to state a cause of action under Maine law (MPAPM)[15] (Rule 80B)[16], or to obtain jurisdiction in a state court, or receive the relief prayed for and awarded *except* as it affected the possible granting of attorney's fees. (*Final Judgment*, A. 43-44.) In Maine, as in most other states, applicants for Aid to Families with Dependent Children have administrative and judicial recourse for a denial or reduction of welfare benefits. For example, claimants may request a "fair hearing" as provided for by § 602(a)(4) of the Social Security Act (Title 42) in order to determine the correctness of the state's action. Also, the Maine Public Assistance Payments Manual allows for judicial review if a "fair hearing" decision is adverse to the AFDC applicant. It is apparent that the respondents had ample remedies available to test the validity of the Commissioner's decision and, therefore, the addition of the bare § 1983 language in the complaint was superfluous as it related to the underlying Social Security claim.

If the Maine court's decision is allowed to stand, challenges to state laws and regulations based on the

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[15] Maine Public Assistance Payments Manual, Chapter I, section C, p. 7 (July, 1974), reads in part: "Within 5 days of the decision, a letter will be sent . . . advising the claimant . . . of his right to judicial review under the Maine Rules of Civil Procedure, Rule 80B. . . ."

[16] Maine Rules of Civil Procedure, Rule 80B, first sentence: "When review by the Superior Court, whether by appeal or otherwise, of any action or failure or refusal to act by a governmental agency, including any department, board, commission, or officer, is provided by statute or is otherwise available by law, proceedings for such review shall, except as otherwise provided by statute, be governed by these Rules of Civil Procedure as modified by this rule."

Supremacy Clause alone will have § 1983 pleadings annexed for the sole purpose of receiving attorney's fees, no matter how far removed from "civil rights" violations the underlying claim may be. Indeed, it is not improbable to hypothesize a virtually limitless number of widely varied actions challenging the good faith decisions of federal, state and local officials while concomitantly alleging a deprivation of a "right" secured by "law" for the purposes of receiving an award of attorney's fees. Certainly, if a good faith disagreement over the interpretation of technically complex language contained in the Social Security Act constitutes a deprivation of a "civil right," petitioners are hardpressed to think of any state or local action that could not similarly be framed as a civil rights violation. Obviously, this was not the intent of the drafters of section 1983 and its predecessors.

II.

THE PROVISIONS OF THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 DO NOT AUTHORIZE AN AWARD OF ATTORNEY'S FEES IN THIS CASE.

A. *The Legislative History of the Fees Act in the Senate Indicates that the Act was not Intended to Apply to the Case at Bar.*

The Civil Rights Attorney's Fees Awards Act of 1976, Public Law 94-559, amending and codified in 42 U.S.C. § 1988, was enacted in response to the decision in *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975)[17]. The *Alyeska* Court

[17] S. Rep. No. 94-1011, 94th Cong., 2d Sess., *reprinted in* [1976] *U.S. Code Cong. and Ad. News* 5911, *at* 4.

upheld the "American Rule," which stated that attorney's fees are not ordinarily recoverable in federal litigation by the prevailing litigant in the absence of statutory authorization. 421 U.S. at 247. A thorough review of the history of the Fees Act discloses specific legislative authorization to award attorney's fees to litigants who have, *unlike the respondents Thiboutot*, been deprived of their civil rights.

The Senate Judiciary Committee Report pertaining to the Fees Act is replete with references to fundamental "civil rights." The Report listed examples of civil rights cases involving discrimination in the areas of employment, housing and private facilities[18] in which an award of attorney's fees was proper. Also, the Judiciary Committee found that, as a result of the "*Alyeska*" decision, fees were "suddenly unavailable in the most fundamental civil rights cases[19]." The Committee concluded that it seemed anomalous that attorney's fees were available in some civil rights cases, but unavailable in suits under § 1983 brought to redress "violations of the Federal Constitution *or laws* by officials sworn to uphold" same[20]. (*Emphasis added.*) Petitioners' submit that when the preceding quotation is read in conjunction with the above noted examples of discrimination, there emerges the conclusion that "*or laws*" refers to those affecting fundamental civil rights.

Proceeding from the Senate Report to the Senate debates, it is once again apparent that the Senators who participated therein believed that the Fees Act would apply to historically defined civil rights actions.

[18] *Id.*
[19] *Id.*
[20] *Id.*

Senator Scott stated that the legislation "would greatly aid the cause of human rights in this country[21]" and would enable the fight to eradicate "discrimination to continue[22]."

Senator Kennedy spoke of the Act as assuring "equal protection of law" to all citizens while protecting them against discrimination, while Senator Hathaway was wary of violations "of fundamental human rights going unchallenged[23]" without the provisions of the Fees Act. Other examples of the kinds of civil rights to be affected by this Act were enunciated by Senators Thurmond and Goldwater, the former offering an amendment to exclude busing cases from the Act[24] and the latter introducing an amendment to include the Internal Revenue Code within the confines of § 1988. While discussing his proposed amendment, Senator Goldwater alluded to abuses of civil rights practiced because "of a man's color or religion[25]." At long last, mention was finally made specifically of the Social Security Act by Senator Helms. However, this passing remark was made only in reference to the increasing caseloads of administrative law judges[26].

Although Senator Abourezk appears to be the only member of the Senate to state a belief that Supremacy Clause cases were also covered by the legislation[27], his suggestion is totally inconsistent with the concept of fundamental "civil rights" to which the Act was meant

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[21] 122 Cong. Rec. 31471 (1976).
[22] *Id.*
[23] 122 Cong. Rec. 31832 (1976).
[24] *Id.*
[25] *Id.* at 32176.
[26] *Id.* at 32933-34.
[27] *Id.* at 33315.

to apply. The Senator, in the same breath, also spoke of eradicating discrimination and insuring that "equal protection under the law" is achieved[28]. Finally, examples of the kinds of cases to which the Fees Act was intended to apply were listed by Senator Kennedy, a primary supporter of the bill:

1. A U.S. Army veteran died, but couldn't be buried in a local cemetery because his skin was black.

2. Black citizens were systematically kept off the jury lists.

3. "...[A] musician was repeatedly followed by police, stopped, harassed and arrested-again because of skin color."

4. Doctors participating in a program of medical assistance to black citizens were denied any privileges in a local hospital.

5. [A] highway was planned to go through black neighborhoods thereby displacing its residents, while carefully skirting around white neighborhoods.

6. Housing projects charged higher rents to those on welfare.

7. Housing authorities operated separate projects rigidly segregated by race.

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[28] *Id.*

8. Mental patients were forced into involuntary, unpaid labor[29].

Clearly, the Senate was thinking of protecting fundamental civil rights and not of providing attorney's fees in *any case* involving a legal wrong.

B. The Legislative History of the Fees Act in the House Demonstrates that the Act was not Intended to Apply to Cases such as This.

The preceding assertion receives ample support from the Report of the House Judiciary Committee. Rep. Drinan, the primary author of that Report, commented that lower courts, prior to the "*Alyeska*" decision, had allowed attorney's fees to be awarded in civil rights cases when private attorneys general aided in "eliminating discriminatory practices adversely affecting all citizens, white and non-white[30]." Rep. Drinan identified examples of the types of § 1983 actions to which the Fees Act would apply[31]:

> § 1983 is utilized to challenge: official discrimination, such as racial segregation imposed by law. *Brown v. Board of Education*, 347 U.S. 483 (1954); [U]nlawful official action in non-racial matters (the imposition of a poll tax). *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966); . . . unconstitutional search of a private residence. *Monroe v. Pape*, 365 U.S. 167 (1961); discrimination on account of political affiliation in public employment. *Elrod v. Burns*, 427 U.S. 347, (1976); terms and conditions of institutional confinement. *O'Connor v. Donaldson*, 442 U.S. 563 (1975).

[29] *Terry v. Elmwood Cemetery*, 307 F. Supp. 369 (N.D. Ala. 1969); *Ford v. White*, 430 F.2d 951 (5th Cir. 1970); *Lyle v. Teresi*, 327 F. Supp. 683 (D. Minn. 1971); *Blumenthal v. Lee Memorial Hospital*, (E.D. Ark. 1971); *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1973); *Hammond v. Housing Authority*, 328 F. Supp. 586 (D. Ore. 1971); *Taylor v. City of Millington*, 476 F.2d 599 (6th Cir. 1973); *Downs v. Department of Public Welfare*, 65 F.R.D. 557 (E.D. Pa. 1974). The above cited cases were cited at 122 Cong. Rec. 33314 (1976).

[30] H. Rep. No. 94-1558, 94th Cong., 2d Sess. at 2 (1976).

[31] *Id.* at 4, 5.

In addition, the House Judiciary Report noted that some lower courts had awarded attorney's fees in cases joining federal statutory claims with constitutional claims. The Report subsequently provided a relevant example in which two standards were delineated in order to assist in a determination of the applicability of the Fees Awards Act. Commenting thereon, the Committee said[32]:

> To the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a *determination on the other claim* for the purpose of awarding counsel fees. *Morales v. Haines*, 486 F.2d 880 (7th Cir. 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. *Hagans v. Lavine*, 415 U.S. 528 (1974). In such cases, if the claim for which

[32] *Id.* at 4, n. 7.

> fees *may be awarded meets* the "*substantiality*" *test*, see *Hagans v. Lavine, supra*; *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' *United Mine Workers v. Gibbs, supra*, at 725. (*Emphasis added.*)

Respondents Thiboutot are not entitled to an award of fees regardless of which of the two above noted standards are applied. If *Morales* is followed[33], there can be "no determination on the other claim for the purpose of awarding counsel fees" because there was no other claim involved. If *Hagans* is invoked, the same result occurs, "as the claim for which fees may be awarded" did not meet the "substantiality" test. (*Opinion Supreme Judicial Court, paragraph* 8, *A*.56.)

Additional specific examples of the intended application of the Fees Act were enumerated in the House debates. Rep. Kastenmeier, Chairman of the Subcommittee on Courts, Civil Liberties and Administration, listed cases, remarkably similar to those noted by Sen. Kennedy[34], to which the Fees Act would apply[35]. Rep. Fish, while referring to the predecessor of § 1983, stated that the Act would affect, *inter alia*, "[s]uits under section 1979 of the Revised Statutes by blacks

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[33] *Morales* concerned allegations in the area of federal subsidized housing in which the presence or absence of racial discrimination was crucial to the determination as to whether or not attorney's fees were to be allowed.

[34] *Supra* at 21-22, n.29.

[35] 122 Cong. Rec. 35126.

denied employment by the State Highway Safety Patrol on the basis of race[36]." Both Reps. Holtzmann and Seiberling stated that a dual function of the Act was to provide for protection of constitutional rights as well as to serve as a combatant against discrimination[37]. Although many more examples could be listed, suffice it to say that these debates offer further evidence that the purpose of the Fees Act was to award attorney's fees for actions involving fundamental civil rights.

Finally, it is of import to note that, at the time of the House subcommittee hearings in 1975 dealing with attorney's fees, three bills were pending in Congress which dealt "expressly with counsel fees in civil rights cases[38]." One such bill, H.R. 7969[39], was introduced by

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[36] *Id.*

[37] *Id.* at 35127.

[38] H. Rep. No. 94-1558, 94th Cong., 2d Sess. at 2 (1976).

[39] H. R. 7969, In the House of Representatives. Drinan (for himself, Mr. Rodino, and Mr. Edwards of California) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL to amend the Civil Rights Act of 1964 to provide reasonable attorney fees in cases involving civil and constitutional rights.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title XI of the Civil Rights Act of 1964 is amended by adding at the end the following new section:

"SEC. 1107. In any civil action to recover damages or to secure equitable or other relief under the Constitution, or any provision of law which provides for the protection of civil or constitutional rights, the court in its discretion may allow the prevailing party other than a governmental entity or any officer thereof acting in an official capacity, reasonable attorney fees as part of the costs, and the governmental entity or officer shall be liable for such costs and fees the same as a private person."

Rep. Drinan, who, while referring to attorney's fees in the House Report, stated that the bill "would permit such awards in any case involving civil or constitutional rights, *no matter what the source of the claim.*" (*Emphasis added*[40].) In contrast, Rep. Drinan said that H.R. 9552 (the predecessor of the Fees Act)[41] would authorize only the awarding of fees brought under specific provisions of the United States Code. From Rep. Drinan's conclusion, it is plain that the source of the claim is relevant and would most certainly affect the validity of an attorney's fees demand based on the Social Security Act. It is, therefore, apparent from the Congressional history of the Fees Act that it was not intended to apply to cases such as this wherein no civil or constitutional rights were violated.

C. Congress Did Not Intend to Authorize an Award of Attorney's Fees for an Error in the Interpretation of the Social Security Act.

The fact that the Fees Act was limited primarily to cases arising under the civil rights laws without mention of the Social Security Act supports the argument that Congress did not intend for fees to be awarded for good faith violations of the latter statute. While the Fees Act was intended to aid enforcement of civil rights, it can hardly be said that the Social Security Act or the AFDC provisions therein were designed to provide for civil rights.

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[40] H. Rep. *supra* at 3, see 121 Cong. Rec. 28742 (1975).

[41] Later passed as H.R. 15460 with amendments to comply with S. 2278, the Senate version which was adopted as Pub. L. 94-559 (Fees Act).

Additionally, there are no "specific and explicit provisions for the allowance of attorneys' fees[42]" for violations of the Social Security Act contained within the Fees Act. Certainly, Congress could have amended § 602(a)(7) of the former to include a fees provision had it so desired, much as it has done in every major civil rights law passed or amended by that body since 1964[43]. In connection therewith, it is important to note that Congress did see fit to amend § 406(b)(1) of the Social Security Act in 1965 and again in 1968[44]. This amended legislation enabled attorneys, in certain restricted situations, to receive fees for successfully representing their clients. Had Congress desired to provide similarly or more expansively for attorneys representing AFDC recipients, it presumably would have done so.

Of course, Congress may well have been aware of the effect that an amendment to the Social Security Act allowing attorney's fees in actions such as the one at bar would have on individual states. For example, the threat of an award of fees for a good faith error in judgment would have a chilling effect on literally hundreds of decisions made every year in each state of the union by welfare program administrators. Also, fees so awarded would, in some instances, be an unforeseen expenditure from state treasuries, thereby imposing a further strain on already limited budgets. Naturally, this would result in less funds being available for other beneficial programs, thereby adding to the deleterious effects that awards of attorney's fees would have if

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[42] *Alyeska Pipeline Services Company v. Wilderness Society*, 421 U.S. 240, 260 (1975).

[43] S. Rep. No. 94-1011, 94th Cong., 2d Sess., *reprinted in* [1976] *U.S. Code Cong. and Ad. News* 5911 at 3.

[44] Pub. L. 89-97, Pub. L. 90-248 (providing, *inter alia*, for fixing of attorney's fees for claimants).

deemed to be authorized by violations of the Social Security Act.

The preceding statements, however, are not to be read as asserting that section 1983 and the Fees Act are inapplicable to *any* action arising out of the Social Security Act. To the contrary, petitioners acknowledge that a denial of Social Security Act benefits based upon unlawful discrimination concerning a person's sex, race or religion could amount to a deprivation of rights within the contemplation of 42 U.S.C. § 1983 and the Attorney's Fees Awards Act. However, in order to determine whether a "civil" or Constitutional right is at issue in any particular case, a court should look not necessarily to the statute involved, but rather to the nature of the defendant's conduct. Certainly, if respondents had their welfare benefits reduced in this case due to their ethnic background, attorney's fees would be proper pursuant to § 1983 and the Fees Act. Conversely, if no Constitutional or fundamental civil rights are at issue, then § 1983 and the Fees Act are inapplicable.

III.

FEDERAL COURTS HAVE EXCLUSIVE JURISDICTION OF 42 U.S.C. § 1983 CLAIMS.

The history of the Civil Rights Act of 1871 does not disclose any intent by the United States Congress to grant jurisdiction to state courts concurrent with their federal counterparts. "It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts." *Monroe v. Pape*, 365 U.S. at 180. (1961). Mr. Justice Harlan, in his concurring opinion in *Monroe*, quoted Senator Frelinghuysen as saying " . . . the injured party should have

an original action in our Federal courts . . . " *Id.* at 197. *Carey v. Piphus*, 435 U.S. 247, 255-56 n.9 (1978), in quoting an opponent of section 1 of the Civil Rights Act of 1871, serves to bolster the above argument: " . . . [A]nd yet by this section jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the State." The background of § 1983 was also discussed in *Mitchum v. Foster*, 407 U.S. 225, 238 (1971). Besides stressing that it was enacted to enforce the Fourteenth Amendment provisions, Senator Osborne was quoted in *Mitchum* as saying " . . . and the courts with reference to which we legislate must be the United States courts." *Id.* at 242. *Mitchum* also makes clear that the very purpose for which § 1983 was enacted was to serve as guardian for the citizenry's federal rights by placing the Federal courts between the States and the people. *Id.* In view of the social conditions which existed at the time of the enactment of the Civil Rights Act of 1866, as well as the specific lack of any mention of intended application of that Act and its progeny to state courts, it is doubtful whether § 1983 may be enforced in state courts.

CONCLUSION

For the foregoing reasons the decision of the Maine Supreme Judicial Court must be reversed.

Respectfully submitted,

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